

## FREEDOM OF CONTRACT: IS IT STILL RELEVANT?

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Those who quest for the euphoria of certitude in the law may find somewhat disconcerting certain judicial decisions referred to in this paper and those seekers for certainty may also experience some paroxysms of anxiety as to the continuing viability of the basic concept of freedom of contract.<sup>1</sup> For those seeking reassurance that freedom of contract is still regarded by the courts as a fundamental principle of Anglo-American law reference should be made to *Blount v. Smith*<sup>2</sup> where the provisions of a partnership contract among physicians delineated the respective interests of the contracting parties, and a partner withdrawing at his own volition asked the court to ignore such explicit terms of the contract which provided that no partner withdrawing for any reason other than death or permanent total disability shall have any interest in or right to accounts receivable representing uncollected fees for services rendered by said partner. The court held that the parties were bound by the express contractual provisions:

... in the absence of evidence of circumstances surrounding the execution, performance and termination of the contract tending at least to show misapprehension upon the part of, and undue disadvantage imposed upon, the party seeking to escape from such provisions, or that the penalty claimed to be imposed upon such party bears no relationship to the loss which may reasonably have been sustained by the other parties to the contract.<sup>3</sup>

In concluding its opinion the court stated:

The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation. A rule of law which would sanction the renunciation of a bargain purchased in freedom from illegal purpose, deception, duress, or even from misapprehension or unequal advantage (*cf. Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242) leads inexorably to individual irresponsibility, social instability and multifarious litigation.<sup>4</sup>

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<sup>1</sup> In the case of *Printing and Numerical Registering Co. v. Sampson*, 19 L.R., Equity 465 (1875) the concept was referred to by Sir George Jessell as follows:

... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

<sup>2</sup> 12 Ohio St. 2d 41, 231 N.E.2d 301 (1967).

<sup>3</sup> *Id.* at 41, 231 N.E.2d at 302.

<sup>4</sup> *Id.* at 47, 231 N.E.2d at 305.

That a court will permit the parties to a contract to establish their own contractual destinies is also made evident by a decision of the Supreme Court of Utah in which it was concluded:

People should be entitled to contract on their own terms without indulgence of paternalism by courts in alleviation of one side or another from the effects of a bad bargain.<sup>5</sup>

The holding of the case was that purchasers of real property were not entitled to recover money paid under a real estate contract where the amount of such payments retained by the seller as liquidated damages as provided by the contract was 9½% of the purchase price.

While stating the doctrine of freedom of contract with his classic rhetoric, Mr. Justice Holmes may have presaged things to come when he said:

. . . Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own. . . . *It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power. . . .* (Emphasis supplied.)<sup>6</sup>

Another representative expression of the freedom of contract concept is the following ruling in *Ullmann v. May*.<sup>7</sup>

Courts do not relieve a party competent to contract from an improvident agreement in the absence of fraud or bad faith.<sup>8</sup>

In exploring freedom of contract and judicial limitations thereon it is deemed unnecessary to do more than merely note as did the court in *Ullmann v. May*<sup>9</sup> that such defenses as fraud, misrepresentation, duress, mistake, and illegality have always been recognized by the courts to prevent the enforcement of a contract.<sup>10</sup> Consideration will not be given to contracts made voidable by fraudulent acts, the type of which have been described as "conscious wrongdoing, an intention to cheat or be dishonest."<sup>11</sup>

Extended attention will likewise not be given to the established contract principle which is often stated as a general rule that one is bound by what one signs.<sup>12</sup> This concept is only a general rule because various

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<sup>5</sup> *Carlson v. Hamilton*, 8 Utah 2d 272, 332 P.2d 989 (1958).

<sup>6</sup> *Daley v. People's Building, Loan & Savings Ass'n.*, 178 Mass. 13, 19-20; 59 N.E. 452, 453 (1901).

<sup>7</sup> 147 Ohio St. 468, 72 N.E.2d 63 (1947).

<sup>8</sup> *Id.* at 468, 72 N.E.2d at 64.

<sup>9</sup> *Id.* at 476, 72 N.E.2d at 68.

<sup>10</sup> 11 S. WILLISTON, CONTRACTS, § 1425 (3d ed. 1968).

<sup>11</sup> *United States v. Wunderlich*, 342 U.S. 98 (1951); see *Havas v. Alger* 461, p.2d 857 (1969) where seller of automobiles was denied recovery from buyer because of fraudulent misrepresentations by the seller that an automobile was a 1960 model when in fact it was a 1959 model.

<sup>12</sup> The original RESTATEMENT OF CONTRACTS, § 70 (1932) states this proposition as follows:

One who makes a written offer which is accepted, or who manifests acceptance of the

court decisions reviewed in this article clearly indicate that a defendant may not always be bound by a writing which he signed.<sup>13</sup> In shifting the cynosure of attention from the strict and traditional application of freedom of contract to various cases where the courts have held that the concept was inapplicable under particular facts, it is appropriate to note the following observation in *Henningsen v. Bloomfield Motors, Inc.*<sup>14</sup> by Justice Francis speaking for a court which has not been characterized by judicial diffidence. In the *Henningsen* case, which is a focal point in judicial development of the doctrine of refusing to enforce unconscionable contracts or portions thereof, the court held unenforceable a disclaimer of liability for breach of warranty by an automobile manufacturer and dealer. At one portion of the opinion Justice Francis said:

In assessing its [the disclaimer's] significance we must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of its burdens. . . . And in applying that principle, the basic tenet of freedom of competent parties to contract is a factor of importance. But in the framework of modern commercial life and business practices, such rules cannot be applied on a strict, doctrinal basis. . . . The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all." Kessler, 'Contracts of Adhesion—Some Thoughts About Freedom of Contract,' 43 *Colum. L. Rev.* 629, 632 (1943); Ehrenzweig, 'Adhesion Contracts in the Conflict of Laws,' 53 *Colum. L. Rev.* 1072, 1075, 1089 (1953) . . .<sup>15</sup>

Seven years later, Justice Francis, speaking for the Supreme Court of New

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terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

See also *Hanes v. Mitchell*, 78 N.D. 341, 49 N.W.2d 606 (1951); *Murphy v. Torstrick*, 309 S.W.2d 767 (Ky. Ct. App. 1958); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Independent Directory Corp. v. Vandenbrock*, 57 Ohio L. Abs. 313; 94 N.E.2d 228 (Ohio App. 1950).

<sup>13</sup> See, *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953); *L. B. Foster Co. v. Tri-W. Construction Co.*, 409 Pa. 318, 186 A.2d 18 (1962); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>14</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>15</sup> *Id.* at 386, 389, 161 A.2d 84, 86.

Jersey,<sup>10</sup> seems to extend the "public policy" doctrine of the *Henningsen* case to a contract in which a real estate broker brought an action against the owners of realty and the prospective purchaser procured by the broker for the broker's commission after the prospective purchaser was unable to complete the contract because of financial inability. The court held that where the failure to complete the sale was due solely to the fault of the prospective purchaser, the owners were not liable to the broker for any commission notwithstanding provisions in the brokerage contract to the contrary which as part of a standardized printed form imposed on the owner liability for a commission immediately upon execution of a contract to sell to a buyer produced by the broker, irrespective of whether the buyer proves unable financially or unwilling for some other unjustifiable reason to complete the sale. The court concluded that the business of the real estate broker is affected with a public interest. In its opinion the court stated:

. . . Although courts continue to recognize that persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way. . . .<sup>17</sup>

The court further stated in explaining the rationale of its decision:

Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 388-391 (1960).<sup>18</sup>

In *Unico v. Owen*,<sup>19</sup> the Supreme Court of New Jersey again faced the perplexing and delicate matter of resolving the competing doctrines of *freedom of contract* and the *standardized mass contract*. In this case the court concluded that a "waiver of defenses" in a conditional sales contract was unenforceable and invalid in an action by the holder of the note against the maker of the note. The holder of the note who was the purchaser thereof was held not to be a holder in due course as against the maker of the note. The court held that Unico (a partnership) which had been expressly formed for the purpose of financing conditional sales of consumer goods and which exercised extensive control over seller's entire business operation, did not have the status of a holder in due course<sup>20</sup> with the respect to

<sup>10</sup> *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

<sup>17</sup> *Id.* at 554, 236 A.2d at 857.

<sup>18</sup> *Id.* at 553, 236 A.2d at 856.

<sup>19</sup> 50 N.J. 101, 232 A.2d 405 (1967).

<sup>20</sup> *Id.* at 121, 232 A.2d 416.

a note executed by the conditional buyer and assigned to the Unico partnership by the seller. It was hence further held by the court that in an action on the note the buyer could assert the defense of failure of consideration resulting from the seller's default with respect to delivery of all goods called for by the conditional sales contract executed contemporaneously with the note. The court refused to enforce a clause in the contract whereby the buyer agreed not to assert defenses against an assignee. This clause was held to be so one-sided as to be contrary to public policy.

The *Unico* decision, which is admittedly beyond the scope and design of this article which is concerned essentially with the common law and section 2-302 of the Uniform Commercial Code, is mentioned because it illustrates a growing tendency by the courts to focus attention upon standardized financing contracts to insure that such contracts must be responsive to equitable considerations. The *Unico* case has received judicial recognition and approval.<sup>21</sup> Recently a court in following the doctrine of the *Unico* case stated:

. . . However, in our opinion, the doctrine so well stated in *Unico* strikes the proper balance between the protection of the commercial need for negotiability and the individual's need for relief against fraud. As that court stated, we are impelled to 'join those courts which deny holder in due course status in consumer goods sales cases to those financiers whose involvement with the seller's business is as close, and whose knowledge of the extrinsic factors—*i.e.*, the terms of the underlying sale agreement—is as pervasive, as it is in the present case.' *Unico v. Owen*, (1967), 50 N.J. 101, 116, 232 A.2d 405, 413.<sup>22</sup>

The *Unico* case is also of especial significance as related to matters to be subsequently discussed in that at least in part the court's decision was based upon that controversial provision of the Uniform Commercial Code<sup>23</sup> which grants the court the authority to declare a contract unenforceable when it is deemed to be unconscionable. Referring to a specific provision of the Uniform Commercial Code giving special treatment to waiver clauses in consumer goods contracts<sup>24</sup> and the unconscionable clause of section 2-302 of the Code, the court concluded:

. . . We see in the enactment of these two sections of the Code an intention to leave in the hands of the courts the continued application of common law principles in deciding in consumer goods cases whether such waiver clauses as the one imposed on Owen in this case are so one-sided as to be contrary to public policy. Cf. *Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D. C. 315, 350 F. 2d 445, 448-449 (1965). For reasons already expressed, we hold that they are so opposed to such policy as to require condemnation. As the New Jersey Study Comment to sec-

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<sup>21</sup> *American Plan Corp. v. Woods*, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968).

<sup>22</sup> *Id.* at 6, 240 N.E.2d 889.

<sup>23</sup> § 2-302.

<sup>24</sup> Uniform Commercial Code § 9-206(1).

tion 2-302 indicates, the practice of denying relief because of unconscionable circumstances has long been the rule in this state. . . .<sup>25</sup>

The court cited the *Henningsen* and other New Jersey cases holding contracts unenforceable because of unconscionable circumstances. The previous discussion of typical cases illustrating the propensity of the courts to permit parties to a contract wide latitude in determining their own contractual status and the other referred to cases clearly indicating that the courts are not impervious to hardships imposed by a strict doctrinal application of freedom of contract may bring back into frustrating focus the comment of Mr. Justice Holmes that: ". . . certainty generally is illusion, and repose is not the destiny of man."<sup>26</sup>

This delicate balance between stability of contract and the protection against unfairness and unconscionable contractual provisions also brings to mind the classic statement of Justice Cardozo who said:

I was much troubled in spirit, in my first years upon the bench, to find how tractless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found 'with the voyager in Browning's 'Paracelsus' that the real heaven was always beyond.' As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.<sup>27</sup>

It was also Cardozo who reminded us that "the law, like the traveler, must be ready for the morrow."<sup>28</sup> That the common law in its case by case evolution is ready for the morrow is reflected as a most delicate problem which calls for enlightened and tempered judicial restraint in the following passages from the *Henningsen* case where the court stated:

The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it . . . to buy an automobile. No bargaining is engaged in with respect to it. . . .

The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? Such control and limitation

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<sup>25</sup> 50 N.J. at 125, 232 A.2d at 418.

<sup>26</sup> Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

<sup>27</sup> B. CARDOZO, NATURE OF THE JUDICIAL PROCESS, 166-67 (1921).

<sup>28</sup> B. CARDOZO, GROWTH OF THE LAW, 20 (1924).

of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract. . . .

Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. They have endeavored thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer to the attempted exculpation of the seller.<sup>29</sup>

The writer of this paper makes no pretense of precision in assisting the law student or the lawyer in reaching "the solid land of fixed and settled rules" for which Justice Cardozo quested. It is hoped however that a discussion of some of the relevant factors wherein the courts attempt to strike the proper balance between freedom of contract and the protection of contracting parties from injustice will sharpen and more clearly delineate the contract and public policy concepts involved. It is submitted that the case law clearly manifests that the lawyer need not be apologetic or feel that he is trafficking in platitudes by telling his client in most factual situations that "you are bound by what you sign" and that usually the parties to a contract determine their contractual status. However, it is also submitted that a review of typical and representative cases illustrates that the courts have not and are not applying with supine indifference and slavish devotion the traditional concept of freedom of contract. It is also felt that a review of the cases will indicate that there has been no wholesale deviation from the freedom of contract doctrine and that much judicial restraint has been exercised in those cases which on their "peripheral facts"<sup>30</sup> the courts have felt justified in qualifying freedom of contract.

The basic thrust of this article is to review representative court decisions reflecting the common law concept of freedom of contract and the judicial limitations thereon. There is no purpose to cover the myriad of statutory provisions which have limited, qualified or affected freedom of contract. It is only to observe the obvious that statutes of various legislative bodies have become a major source of contract law.<sup>31</sup> In addition to the comprehensive Uniform Commercial Code, there also affects contract law a growing number of statutes of which the following are only illustrative: (1) a recently enacted Ohio statute provides that:

A cardholder who receives a credit card from an issuer, which such cardholder has not requested nor used, shall not be liable for any use made of

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<sup>29</sup> 32 N.J. 390-91, 161 A.2d 87-88 (1960).

<sup>30</sup> *Id.* at 358, 161 A.2d at 69.

<sup>31</sup> The Uniform Commercial Code is a basic example.

such credit card which has not been authorized by such cardholder, unless such credit card is in replacement or renewal of a credit card previously requested or used by the cardholder.<sup>32</sup>

(2) Another Ohio statute which has not been judicially interpreted seems designed to abrogate the implied acceptance doctrine of the common law.<sup>33</sup> This statute provides:

Where any merchandise is offered for sale by means of its voluntary delivery to an offeree who has neither ordered nor requested it, the delivery of such merchandise constitutes an unconditional gift to the recipient.<sup>34</sup>

(3) Various statutes affect the "manifested mutual assent"<sup>35</sup> of the seller and buyer in the area of home solicitation sales by providing that the buyer has the right of rescission of the contract during a stated "cooling-off period." This type of statute grants the buyer the right to cancel a contract within a short period of time after completion of the sale.<sup>36</sup> The new Consumer Credit Protection Act<sup>37</sup> enacted by Congress grants the buyer a right of rescission by providing:

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later by notifying the creditor, in accordance with the regulations of the Board, of his intention to do so.<sup>38</sup>

Attention will now be given to a categorization of typical court decisions which fall into four suggested classifications: (1) A review will be made of representative court decisions applying the basic freedom of contract doctrine. These cases illustrate that American courts traditionally take the view that competent contracting parties may contract on their own terms provided such contract terms are neither illegal nor contrary to public policy and that in the absence of such factors as fraud, mistake or duress, the party who enters into a contract is bound thereby, however improvident the bargain might be. (2) A review will be made of cases

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<sup>32</sup> OHIO REV. CODE § 1319.01 (Page Supp. 1969). The cases relative to the contractual liability of the person who loses his credit card are reviewed in *Sears, Roebuck and Co. v. Duke*, 441 S.W.2d 521 (Texas Sup. Ct. 1969).

<sup>33</sup> *Austin v. Burge*, 156 Mo. App. 286, 137 S.W. 618 (1911).

<sup>34</sup> OHIO REV. CODE § 1333.60 (Page Supp. 1969).

<sup>35</sup> RESTATEMENT OF CONTRACTS, § 20 (1932).

<sup>36</sup> See GA. CODE ANN. § 96-906 (Supp. 1968); MASS. ANN. LAWS ch. 255 D, Section 14 (1968); MICH. COMP. LAWS ANN. § 445.1202(c) (1968); UTAH CODE ANN. § 70B-2-503 (Supp. 1969).

<sup>37</sup> 15 U.S.C.A. § 1635 (Supp. 1969).

<sup>38</sup> *Id.*



indicating that courts have refused to enforce contracts deemed to be unconscionable. The basic purpose of this categorization is to review the judicial limitations on the liberty of contract and to point out that freedom of contract has not been permitted to override all concepts of public interest and public policy. (3) This category will reveal the various rules of interpretation whereby the courts short of finding that a contract was unconscionable and hence unenforceable have found in oblique and somewhat abstruse nuances of language and interpretation bases for holding that some harsh or otherwise exculpatory provision would not be applied. (4) Lastly, considerations will be given to the controversial section 2-302 of the Uniform Commercial Code which authorizes a court to refuse enforcement of a contract if it determines such contract or any clause thereof to have been unconscionable at the time it was made. To explore the "unconscionable" provision of the Code in extended depth would be in the alternative an exercise in superfluity or a super arrogation in view of the welter of legal articles exploring with conjectural analysis the meaning or amorphous lack of meaning of the unconscionability clause.<sup>39</sup> No attempt will be made to cover the various other provisions of the Uniform Commercial Code such as those that operate in a negative way to prohibit the inclusion of certain contract terms and those that operate in a more positive way to require the inclusion of certain terms.<sup>40</sup>

## I. FREEDOM OF CONTRACT—A CONCEPT OF CONTINUING VITALITY

With no intentment to be exhaustive, review will now be made of various court decisions which are typical of the judicial application of freedom of contract. Before so doing, it seems appropriate to merely note that freedom of contract and the power of the contracting parties to control the rights and obligations they create seems to be a basic feature of the second *Restatement of Contracts* that is now in progress. The adherence to freedom of contract in the second *Restatement* is indicated in the use of the qualifying phrases such as "unless otherwise agreed" or "unless a contrary intention is manifested."<sup>41</sup> That the writers of *Restatement* second recognized restrictions on the freedom of contract is made evident in the comments,<sup>42</sup> but it also seems clear that freedom of contract is still the basic theme in the second *Restatement*, for the comments state: "The

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<sup>39</sup> In his article, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 486 n. 3 (1966-67), Professor Arthur Leff indicates that there are in excess of 130 discussions of section 2-302 of the Uniform Commercial Code in various legal periodicals.

<sup>40</sup> See, e.g., UNIFORM COMMERCIAL CODE §§ 1-201(10), 2-316(2), 2-209(2), 2-201(2).

<sup>41</sup> E.g., RESTATEMENT (SECOND) OF CONTRACTS § 98 (Tent. Draft No. 2, 1965).

<sup>42</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note & Section 5A, comments b, c (Tent. Draft No. 1, 1964).

governing principle in the typical case is that bargains are enforceable unless some other principle conflicts."<sup>43</sup>

That freedom of contract is not unlimited, however, is specifically recognized in the *Restatement of Contracts, Second*, in the Tentative Draft No. 5, March 31, 1970 where in a new Section 234 it is provided that a court may refuse to enforce an unconscionable contract or term thereof. This new Section which closely follows Section 2-302 of the Uniform Commercial Code provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.<sup>44</sup>

In the previously referred decision of *Blount v. Smith*,<sup>45</sup> the Ohio Supreme Court was asked by the plaintiff, Dr. Blount, through a declaratory judgment action to ignore the provision of a partnership contract among doctors which provisions severely restricted a withdrawing doctor's receipt of accounts receivable representing fees for his services rendered during the entire balance of the fiscal year in which the doctor withdrew. The evidence in the record before the court was unsatisfactory and did not show Dr. Blount was the victim of any fraud, deception or fraud with respect to the consummation of the contract. The court refused any relief to Dr. Blount and held that it would leave the litigants in the position which their contracts placed them. The court concluded:

We are asked by plaintiff to approve the brushing aside of the explicit terms of a contract which, we must assume, in absence of a showing to the contrary, was executed on his part without misunderstanding or imposition. A court is required to approach that task with no less restraint than in striking down a statute.<sup>46</sup>

In *Ullmann v. May*<sup>47</sup> it was held that a salesman could not recover any compensation on the basis of contract or *quantum meruit* because the salesman received from his employer precisely what was called for by their contract. The plaintiff, Ullmann, entered into a contract with his employer to perform the services of a salesman. The employer agreed to pay Ullmann commissions and bonuses as provided in their written contract. The contract contained the two following controlling provisions:

In addition to payment due under provisions above, commissions will be paid employee as shown below on all sums of money billed to, and col-

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<sup>43</sup> RESTATEMENT (SECOND) OF CONTRACTS § 19, comment b (Tent. Draft No. 1, 1964).

<sup>44</sup> RESTATEMENT (SECOND) OF CONTRACT § 234 (Tent. Draft No. 5, 1970).

<sup>45</sup> 12 Ohio St. 2d 41, 231 N.E.2d 301 (1967).

<sup>46</sup> *Id.* at 46-7, 231 N.E.2d 305.

<sup>47</sup> 147 Ohio St. 468, 72 N.E.2d 63 (1947).

lected from each individual client personally procured by the employee; *said commissions to be paid only during the time this agreement remains in full force and effect.*<sup>48</sup>

Another provision of the contract provided that:

*This contract of employment may be terminated by either of the parties hereto upon giving to the other party not less than seven days written notice of the intention to cancel this agreement.*<sup>49</sup>

In accordance with these contractual provisions the employer gave to Ullmann, the salesman, written notice of the cancellation of his services. It was held that under the contractual provisions quoted the salesman Ullmann was not entitled to be paid a commission on billings and collections made subsequent to the termination of the contract. The syllabus of the court states:

Where a written agreement is plain and unambiguous it does not become ambiguous by reason of the fact that in its operation it will work a hardship on one of the parties thereto and corresponding advantage to the other. (*Ohio Crane Co. v. Hicks*, 110 Ohio St., 168, approved and followed).<sup>50</sup>

The freedom of contract rationale of the *Ullmann* case was relied upon by a federal court many years later.<sup>51</sup> An attorney in his letter contract with his client offered to present the client's claim to a state board on a related matter ". . . without charge to you . . . out of any recovery in your claim, you are to pay me a percentage figure acceptable to you. . . ."<sup>52</sup> The attorney prepared the proper claim and recovered \$137,341.81. The evidence indicated that both the attorney and his client knew and understood that the attorney's normal charge was twenty-five per cent of any recovery, which in the case would have amounted to \$34,335.45. However, the client notified the attorney that the client had determined that \$2,000.00 was adequate payment for the attorney's services. The court denied the attorney's action for recovery of additional fees, holding that in accordance with the terms of the contract, the client had the contractual right to pay the attorney the \$2,000.00 which \$2,000.00 amount the court held was not in itself sufficient to justify an inference of fraud or bad faith.

In 1962, *Inman v. Clyde Hall Drilling Company, Inc.*,<sup>53</sup> presented an interesting case to the Alaska Supreme Court wherein an employee entered into a written contract to work as a derrickman for an oil drilling

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<sup>48</sup> *Id.* at 470, 72 N.E.2d 67.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 468, 72 N.E.2d at 64.

<sup>51</sup> *Hogan v. Wright*, 356 F.2d 595 (6th Cir. 1966).

<sup>52</sup> *Id.*

<sup>53</sup> 369 P.2d 498 (Alaska Sup. Ct. 1962).

company. One portion of the written contract set forth as a condition precedent that the employee agreed that he would within thirty days after any claim arose out of or in connection with the employment give written notice to the company for such claim and setting forth in detail the facts relative thereto. The court held that this provision of the employment contract was not void as contrary to public policy, and the failure of the employee to give such notice within such time limitation barred the employee's action against the employer for damages for alleged breach of the employment contract. The court's decision was based on the basic rationale that "competent parties are free to contract and are bound by their agreements."<sup>54</sup> In its opinion the court further stated:

In the absence of a constitutional provision or statute which makes certain contracts illegal or unenforceable, we believe it is the function of the judiciary to allow men to manage their own affairs in their own way.<sup>55</sup>

In the course of the opinion in the *Inman* case the court referred to the *Henningsen* case and stated that:

We recognize 'that freedom of contract' is a qualified and not an absolute right, and can not be applied on a strict, doctrinal basis. An established principle is that a court will not permit itself to be used as an instrument of the inequity and injustice.<sup>56</sup>

The court found, however, that the doctrine of *Henningsen* was here inapplicable and applied the traditional freedom of contract doctrine. In so doing, the court concluded:

There was nothing to suggest that Inman (the employee) did not have the knowledge, capacity or opportunity to read the agreement and understand it; that the terms of the contract were imposed upon him without any real freedom of choice on his part; that there was any substantial inequality in bargaining positions between Inman and the Company. Not only did he attach a copy of the contract to his complaint, which negatives any thought that he really wasn't aware of its provisions, but he also admitted in a deposition that at the time he signed the contract he had read it, had discussed it with a Company representative, and was familiar with its terms.<sup>57</sup>

Freedom of contract was adhered to by the much respected Court of Appeals of New York in a 1961 decision<sup>58</sup> in which recovery was denied to a wife for personal injuries and to her husband for medical expenses and loss of services, resulting from injuries which the wife sustained as the result of a fall at or near the edge of a swimming pool located on the defendant's premises. The defendant in the case was a private gymna-

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 500.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925 (1961).

sium operator who admitted persons as members or patrons under a written contract which clearly provided as a condition of membership that such member or patron relieved the operator from liability for the operator's negligence. After reviewing various cases concerning this exculpatory clause, the court held that the clause barred recovery under the complaint of the plaintiff charging ordinary negligence. The court pointed out that exculpatory clauses in a contract designed to protect one of the parties from liability resulting from his own negligence are closely scrutinized by the courts but that in this case, the contractual provision was expressed in clear and unequivocal language and the wife who became a member of the defendant's gymnasium pursuant to such contract was barred from recovery. In the course of its opinion, the court pointed out that exculpatory clauses have been held unenforceable when contained in the contract of carriage of a common carrier or in the contract of a public utility or when imposed by the employer as a condition of employment. In concluding its opinion the court reflected its rationale as follows:

Here there is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffectual. Defendant, a private corporation, was under no obligation or legal duty to accept plaintiff as a "member" or patron. Having consented to do so, it had the right to insist upon such terms as it deemed appropriate. Plaintiff, on the other hand, was not required to assent to unacceptable terms, or to give up a valuable legal right, as a condition precedent to obtaining employment or being able to make use of the services rendered by a public carrier or utility. She voluntarily applied for membership in a private organization, and agreed to the terms upon which this membership was bestowed. She may not repudiate them now.<sup>59</sup>

The courts have applied the freedom of contract concept in an infinite variety of factual circumstances. To avoid undue prolongation of this article and to conclude it in "our time," reference will be made to a few additional cases. It has been held that an exculpatory clause releasing a circus from all claims and demands growing out of any injury or accident to a trapeze artist during the period of performance under the contract released the circus from liability for ordinary negligence for injuries sustained by the performer during her act.<sup>60</sup>

In an action for breach of contract brought by the plaintiff, an oil jobber, against the defendant, The Pure Oil Company, it was held that

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<sup>59</sup> *Id.* at 297-98, 177 N.E.2d 927.

<sup>60</sup> *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941). See also *D'Onofrio v. Sun Oil Company*, 277 F.2d 543 (6th Cir. 1960) where an exculpatory clause immunized the lessor, Sun Oil Company from injuries to lessee, a service station operator. The injuries to lessee resulted from the alleged negligence of the oil company in repair of hoist which collapsed and dropped down on lessee.

under a long term contract requiring the plaintiff-buyer to give the oil company-seller written notice on the first day of each month during the existence of the contract of every claim that buyer had against seller and providing that failure to do so would constitute a release of such claim, it was held that such provision was not unreasonable or contrary to public policy and was a condition precedent to maintenance of action by the plaintiff.<sup>61</sup>

An exculpatory clause was held valid as part of an agreement between the participant in and the proprietor of a stock car race whereby the participant assumed the risk of injury resulting from his participation in such event. It was further held that such exculpatory clause in the contract released the proprietor of the track from any claims for damages by the participant and that such clause was not invalid as against public policy.<sup>62</sup> However, the Supreme Court of New Jersey in a 1967 decision held a similar exculpatory clause in a stock car racing contract to be invalid as against public policy because such clause purported to contract away safety requirements for stock car racing prescribed by statute.<sup>63</sup>

## II. EXCULPATORY CLAUSES IN REAL ESTATE LEASES

The courts have frequently faced the question of whether the freedom of contract concept applies to exculpatory clauses which are designed to protect a landlord from his negligence or that of his employee. One well-known case which held that the tenant was barred from recovery because the lease contained an exculpatory clause protecting the landlord from liability for his negligence met with swift legislative response.<sup>64</sup> In holding that the exculpatory clause protected the landlord from liability, the court stated:

Freedom of contract is basic to our law. But when that freedom expresses itself in a provision designed to absolve one of the parties from the consequences of his own negligence, there is danger that the standards of conduct which the law has developed for the protection of others may be diluted. . . . The relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid. There are literally thousands of landlords who are in competition with one another. . . . Judicial determinations of public policy cannot readily take account of sporadic and transitory circumstances. They should rather, we think, rest upon a durable moral basis.<sup>65</sup>

<sup>61</sup> Brooks v. The Pure Oil Company, 126 F. Supp. 426 (E.D. Ky. 1954).

<sup>62</sup> French v. Special Services, Inc., 107 Ohio App. 435, 159 N.E.2d 785 (1958); in accord, Hine v. The Dayton Speedway Corp. 20 Ohio App. 2d 185, 252 N.E.2d 648 (1969).

<sup>63</sup> McCarthy v. Nat. Assoc. For Stock Car Auto Racing, Inc., 48 N.J. 539, 226 A. 2d 713 (1967).

<sup>64</sup> O'Callaghan v. Waller & Beckwith Realty Company, 15 Ill. 2d 436, 155 N.E.2d 545 (1958). Following this decision, the Illinois legislature enacted a law which invalidates such clauses in leases. ILL. REV. STAT., ch. 80, § 15a (1959).

<sup>65</sup> 15 Ill. 2d at 438, 440-41, 155 N.E.2d at 546-7.

The court recognized that the State of New York by statute had made exculpatory clauses in leases invalid.<sup>66</sup> As will be indicated at a further point other courts have held such exculpatory clauses in leases to be invalid.<sup>67</sup>

In 1961 the Supreme Court of Alabama<sup>68</sup> held valid an exculpatory clause in a lease whereby the tenant waived any claim for damages against the landlord from injuries resultant from any defects in the apartment building which existed at the date of the lease or which arose subsequent thereto. The court held that this exculpatory clause barred recovery by the tenant since such clause was part of a contract binding upon the parties and that such clause was not contrary to public policy.

The Supreme Court of Kansas in *Talley v. Skelly Oil Company*<sup>69</sup> held that the sub-lessee of a gasoline service station was barred from recovery by an exculpatory clause for injuries sustained when an overhead heater slipped from its moorings and struck the sub-lessee in the back. The exculpatory clause in the sub-lessee's lease with the Skelly Oil Company waived the sub-lessee's right to damages for any injury due to the negligence of the lessor. The sub-lessee who operated the service station maintained that the clause was void as against public policy. The court, while holding that exculpatory contracts are not favored in the law and are to be strictly construed, nevertheless found that in the absence of statute the court could discern no public policy which was violated by the exculpatory clause in question. In reaching this conclusion the court followed what it stated to be a general rule that exculpatory agreements voluntarily entered into by parties standing on an equal footing are enforceable as between the contracting parties themselves. In support of its conclusion the court cited a decision of the Maryland Court of Appeals<sup>70</sup> which held valid a clause exempting a landlord from liability to a tenant for injuries occurring on premises in an apartment house and also relied upon the following statement in Williston:

Though the relationship of landlord and tenant is such that its incidence have been regulated by statute to some extent, it is clear that apart from statute a landlord may at common law exempt himself from liability for negligence.<sup>71</sup>

The court further noted as distinguishable the case of *Hunter v. Ameri-*

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<sup>66</sup> *Id.* at 441, 155 N.E.2d at 547.

<sup>67</sup> *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941); *Kuzmiak v. Brookchester, Inc.*, 33 N.J. Super. 575, 111 A.2d 425 (1955).

<sup>68</sup> *Baker v. Wheeler, Lacey & Brown, Inc.*, 272 Ala. 101, 128 So. 2d 721 (1961).

<sup>69</sup> 199 Kan. 767, 433 P.2d 425 (1967).

<sup>70</sup> *Eastern Ave. Corp. v. Hughes*, 228 Md. 477, 180 A.2d 486 (1962). The Maryland legislature subsequently enacted legislation which declared such exculpatory clauses invalid. 5 Md. Ann. Code, art. 53, Section 40 (1957).

<sup>71</sup> 6 S. WILLISTON, CONTRACTS § 1751C (Revised Edition, 1938). See also Restatement of Contracts, Sections 574 and 575 (1932).

*can Rentals, Inc.*,<sup>72</sup> which held invalid an exculpatory clause in a car trailer rental contract which absolved the rental company from liability in case of accident. The renter of the trailer was injured when a hitch broke and the trailer swayed and overturned Hunter's automobile. In the Hunter case the court concluded that the clause was contrary to public policy of the state reflected in safety statutes applicable to the business of renting trailers to the public.

The Supreme Court of New Hampshire<sup>73</sup> has squarely held that a landlord could not relieve himself of duty to use ordinary care to keep the stairs in a building leading to tenements in reasonably safe condition by contract with the tenant. Hence, the court further held that the exculpatory clause in the lease did not exempt the landlord from liability where the tenant was injured while descending a defective stairway.

A New Jersey court has also held that when the negligence of a landlord amounts to the creation and maintenance of a nuisance an exculpatory clause will not protect the landlord from liability. In this case the court stated:

We also take judicial notice that under present housing conditions the bargaining positions of landlord and tenant in an apartment building are decidedly unequal. . . .<sup>74</sup>

With respect to industrial and commercial leases containing exculpatory clauses, the courts have applied the freedom of contract doctrine and upheld such clauses on the basis that exculpatory clauses in leases of industrial property are valid since no inequality of bargaining power exists.<sup>75</sup>

In the 1967 decision of *Mayfair Fabrics v. Henley*<sup>76</sup> the Supreme Court of New Jersey held that a commercial tenant could not recover from the landlord for the tenant's personal property destroyed in a fire caused by the landlord's negligence. The lease contained an exculpatory clause absolving the landlord for loss or damage to the tenant's property

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<sup>72</sup> 189 Kan. 615, 371 P.2d 131 (1962). Other courts have also held invalid exculpatory clauses as being contrary to public policy which policy the court discerned in statutory provisions. In *Feldman v. Stein Building & Lumber Co.*, 6 Mich. App. 180, 148 N.W.2d 544 (1967) the court held invalid an exculpatory clause in a residential lease which provided that the landlord was not liable for damage or injury occasioned by snow, water or ice upon or near the leased premises. The exculpatory clause was deemed to be contrary to the Michigan housing law imposing duty to keep the premises clean which statutory duty the court concluded also applied to snow and ice removal.

It has also been held that a lessor was not exculpated, by an exculpatory clause in a lease, from liability for property damage from lessor's own negligent acts violative of Ohio Building Code. *American States Insurance Co. v. The Hannan Construction Co.*, 283 F. Supp. 988 (N.D. Ohio), *aff'd*, 392 F.2d 171 (6th Cir. 1968).

<sup>73</sup> *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941).

<sup>74</sup> *Kuzmiak v. Bookchester, Inc.*, 33 N.J. Super. 575, 587, 111 A.2d 425, 432 (1955).

<sup>75</sup> *Midland Carpet Corp. v. Franklin Association Properties*, 90 N.J. Super. 42, 216 A.2d 231 (1966); *Moreira Construction Co. v. Moretrench Corp.*, 97 N.J. Super. 391, 235 A.2d 211 (1967).

<sup>76</sup> 48 N.J. 483, 226 A.2d 602 (1967).



by fire, explosion, or otherwise. The court concluded that "As in *Midland*, the parties here were not in unequal bargaining positions."<sup>77</sup>

But the parade of exculpatory lease cases continues. A 1970 court of appeals decision in *Washington*<sup>78</sup> indicates that freedom of contract is deeply ensconced in the law. The court held that two apartment tenants could not recover for injuries allegedly caused by the landlord's negligent maintenance of common passageways. The leases of the tenants contained the following exculpatory clause:

That neither the Lessor, nor his Agent, shall be liable for any injury to Lessee, his family, guests or employees or any other person entering the premises or the building of which the demised premises are a part.<sup>79</sup>

The court concluded that this exculpatory clause was valid and not contrary to public policy of the State of Washington and so holding relied upon two decisions of the Supreme Court of Washington<sup>80</sup> and Section 575 of the original *Restatement of Contracts*.

It was also noted by the court that statutes in some states have been enacted declaring such exculpatory clauses to be void.<sup>81</sup>

### III. STRICT CONSTRUCTION OF EXCULPATORY CLAUSES

In various cases the courts have avoided a direct confrontation with the freedom of contract concept with respect to various types of exculpatory clauses by adopting various nuances of the rule that such clauses will be strongly construed against the user thereof. The New York Court of Appeals in a 1963 case<sup>82</sup> held that contracts will not be construed to absolve a party from or indemnify him against his own negligence unless such intention is expressed in unequivocal terms. The basic question in the case was whether a written notice which accompanied film sold to the plaintiff, a corporation engaged in commercial photography, by the defendant, a film company, was effectual to limit the film company's liability for any negligence in the processing of the film. During the development of the film by the defendant a substantial portion was so damaged by a deposit of foreign material and by ink marks that much of the film became commercially valueless. The defendant took the position that it was not liable to the plaintiff for over \$1500 which the plaintiff incurred in expenses retaking certain sequences with the film in order to fulfill its contractual obligations with another party. In taking this position the de-

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<sup>77</sup> *Id.* at 488, A.2d at 605.

<sup>78</sup> *McCutcheon v. United Homes Corp.*, 469 P.2d 997 (Wash. Ct. App. 1970).

<sup>79</sup> *Id.* at 998.

<sup>80</sup> *Broderson v. Rainer Nat'l Park Co.*, 187 Wash. 399, 60 P.2d 234 (1936); *Griffiths v. Henry Broderick, Inc.*, 27 Wash. 2d 901, 182 P.2d 18 (1947).

<sup>81</sup> 469 P.2d at 998.

<sup>82</sup> *Willard Van Dyke Productions v. Eastman Kodak Co.*, 12 N.Y. 2d 301, 189 N.E.2d 693 (1963).

fendant relied upon a "notice" set forth on a label on the box containing the film. The notice stated rather plainly, in black type against a white background:

FILM PRICE DOES NOT INCLUDE PROCESSING . . . READ THIS NOTICE. This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company. Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind. Since dyes used with color films, like other dyes, may, in time, change, this film will not be replaced for, or otherwise warranted against, any change in color.<sup>83</sup>

It was conceded that the plaintiff was aware of the nature of the label's contents and the only question for decision by the court was whether the above quoted notice effectively limited the defendant's liability for negligence in developing the film. The court stated:

The law looks with disfavor upon attempts of a party to avoid liability for his own fault and, although it is permissible in many cases to contract one's self out of liability for negligence, the courts insist that it must be absolutely clear that such was the understanding of the parties. In other words, it must be plainly and precisely provided that 'limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility.'<sup>84</sup>

Here the court cited many cases including the case where an exculpatory clause prevented recovery by a member of a health studio who sustained an injury due to the slippery condition of the area around the swimming pool.<sup>85</sup>

The court concluded that the quoted clause did not immunize the defendant from liability because such notice failed to unequivocally state that the parties had agreed to limit the manufacturer's liability for its own negligence and the label notice that the film price did not include the processing, did not limit the liability of the defendant (manufacturer) for any negligence in processing of the film after exposure.

That a court can adroitly avoid a direct clash between freedom of contract and the needs of public policy is manifested by an Illinois lower court decision<sup>86</sup> where it was held that an exculpatory clause in a lease did not protect the landlord from injury sustained by the tenant when the tenant was struck on the head by falling plaster while make a condolence call on another tenant in the same apartment building. The lessor of the apartment building pleaded as a defense a typical exculpatory clause very

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<sup>83</sup> *Id.* at 303, 189 N.E.2d at 694.

<sup>84</sup> *Id.* at 304, 189 N.E.2d at 694.

<sup>85</sup> *Ciofalo v. Vic Tanney Gyms, Inc.*, 220 N.Y.S.2d 962, 177 N.E.2d 925 (1961).

<sup>86</sup> *Moss v. Hunding*, 27 Ill. App. 2d 189, 169 N.E.2d 396 (1960), *see also* *Kay v. The Pennsylvania Rd. Co.*, 156 Ohio St. 503, 103 N.E.2d 751 (1952) where it was held contracts of indemnity purporting to relieve one from the results of his own negligence must be strictly construed and the intention to not so indemnify must be expressed in clear, unequivocal terms.

broad in scope which seemed to immunize the lessor from any negligence in or around the apartment building. The plaintiff, however, contended that the clause was inapplicable to his action because the wrong of which he complained was committed by the lessor in circumstances outside of the lessor-lessee relationship. In short, the plaintiff contended that he was injured while he was an invitee of another tenant. The court concurred with the view of the plaintiff and held the exculpatory clause inapplicable based upon the rationale that the clause applied to the plaintiff only in his status as a lessee and not as an invitee of another tenant. The familiar rule of interpretation was applied by the court that "an agreement protecting one from the consequences of his own negligence must be in clear and explicit language or expressed in unequivocal terms."<sup>87</sup> This reasoning was buttressed by the further conclusion of the court that ambiguous language in a lease will be construed most strongly against the lessor. The defendant contended that the decision of the Illinois Supreme Court in *O'Callaghan v. Waller & Beckwith Realty Co.*<sup>88</sup> was here applicable. However, the court concluded that the plaintiff did not question the applicability of the exculpatory clause to the circumstances of the action in the *O'Callaghan* case, and hence the court felt that it was not bound to follow the doctrine of that case.

A Pennsylvania court<sup>89</sup> has held an exculpatory clause inapplicable in the following factual situation: A minor child was injured when a mantle in a home, rented by the child's parents, fell upon her. The defense of the lessor was an exculpatory clause which exempted the lessor from negligence or from any injury to the lessees in areas of the home set forth in great detail. The parents of the injured did not contest the validity of the exculpatory clause since at that time the validity of such clauses between lessors and lessees in Pennsylvania had been firmly established by a decision of the Pennsylvania Supreme Court.<sup>90</sup> The court held that the clause did not exempt the lessor from liability for the injury to the child because the court concluded that the clause did not specifically release the lessor for negligence which did not arise during the lease term. It was the conclusion of the court that the unsafe construction of the mantle existed prior to the commencement of the lease term with knowledge of the lessors and without the knowledge of the lessees and hence the exculpatory clause by its own terms was inapplicable. The court also stressed that an exculpatory provision in a lease must be construed strongly against the landlord.

Three recent decisions of the Pennsylvania Supreme Court,<sup>91</sup> when

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<sup>87</sup> 27 Ill. App. 2d at 193, 169 N.E.2d at 399.

<sup>88</sup> 15 Ill. 2d 436, 155 N.E.2d 545 (1958).

<sup>89</sup> *Strothman v. Houggy*, 186 Pa. Super. 638, 142 A.2d 769 (1958).

<sup>90</sup> *Manius v. Housing Authority of City of Pittsburgh*, 350 Pa. 512, 39 A.2d 614 (1944).

<sup>91</sup> *Galligan v. Arovitch*, 421 Pa. 301, 219 A.2d 463 (1966); *Employers Liability Assur-*

contrasted with the 1944 decision of that court in *Manius v. Housing Authority of City of Pittsburgh*,<sup>92</sup> clearly indicate that the court now does a great deal more in construing exculpatory clauses than merely adhere to the freedom of contract rubric. In the 1944 *Manius* case, the court held valid an exculpatory clause in a lease entered into between the lessor, the City of Pittsburgh Housing Authority and a tenant, which clause released the city-landlord from liability for any injury resulting from any cause except willful acts. The court held this clause valid as not being in contravention of public policy. However, the three recent decisions of the Pennsylvania Supreme Court previously adverted to indicate a much more sophisticated approach to the area of exculpatory clauses than was reflected in the *Manius* decision. In the 1966 decision, *Galligan v. Arovitch*<sup>93</sup> the court was faced with the factual situation in which the widow, as a lessee, brought an action against her lessor for injuries sustained when the widow-lessee tripped on the lawn area in front of the lessor's apartment building. As a defense the lessor relied upon an exculpatory clause which set forth in great detail that the lessee agreed to relieve the lessor from all liability by reason of any damage or injury to any property or to the lessee or lessee's guests, servants and employees, which may arise from or be due to the use of various specified areas and portions of the apartment building. However, the plaintiff contended that the exculpatory clause was inoperative in this case because the injury to the plaintiff did not occur at one of the locations specified in the exculpatory clause. It was further contended more broadly by the plaintiff that the clause was void as being contrary to public policy. As a starting point in its decision the court stated the following rule of interpretation:

An agreement or instrument which reduces legal rights which would otherwise exist is strictly construed against the party asserting it and must spell out with the utmost particularity the intention of the parties. *Morton v. Ambridge Borough*, 375 Pa. 630, 101 A. 2d 661 (1954). Likewise, the rules of construction require that a written instrument be strictly construed against the maker. . . .<sup>94</sup>

The court further concluded that the plaintiff was injured on the lawn area of the lessor's premises but that the exculpatory clause purported to relieve the lessor of liability, for injury or damage occurring at any one of seven places—elevators, hatches, openings, stairways, fire escapes, hallways and sidewalks—none of which included the lawn. The court permitted the plaintiff to recover, holding that the exculpatory clause did not apply to the injury to the plaintiff which took place in the lawn area.

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ance Corp. v. Greenville Business Men's Association, 423 Pa. 288, 224 A.2d 620 (1966); *Korwasinski v. Rasner*, 436 Pa. 32, 258 A.2d 865 (1969).

<sup>92</sup> 350 Pa. 512, 39 A.2d 614 (1944).

<sup>93</sup> 421 Pa. 301, 219 A.2d 463 (1966).

<sup>94</sup> *Id.* at 303, 219 A.2d at 465.

However, as related to freedom of contract, the court did not confine its decision by reference to the rules of strict construction. While the court stated that it felt that the rules of strict construction were alone sufficient to render the exculpatory clause inapplicable to this factual situation, the writer of the court's opinion, Justice Cohen, also noted that the policy considerations, which, although not necessary to the decision, reflect his personal observation, do bear some relevance. At this point the opinion of the court reads:

The exculpatory clause is today contained in every form lease and, understandably enough, landlords are unwilling to strike therefrom that provision which strongly favors them. Thus it is fruitless for the prospective tenant of an apartment to seek a lease having no exculpatory clause. The result is that the tenant has no bargaining power and must accept his landlord's terms. There is no meeting of the minds, and the agreement is in effect a mere contract of adhesion, whereby the tenant simply adheres to a document which he is powerless to alter, having no alternative other than to reject the transaction entirely. *It is obvious that analysis of the form lease in terms of traditional contract principles will not suffice, for those rules were developed for negotiated transactions, which embody the intention of both parties.* (Emphasis supplied) Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197, 1206 (1963). I do not dispute the rule that a covenant against liability for acts of negligence is valid and enforceable when entered into by private individuals in furtherance of their personal affairs. *Cannon v. Bresch*, 307 Pa. 31, 160 A. 595 (1932). But I do believe that such a rule necessarily assumes that each party is a free bargaining agent, which, it is evident, a prospective tenant for an apartment being unable to bargain away an exculpatory clause, is not.<sup>95</sup>

It is interesting to note that two additional judges concurred in the result on the ground that the exculpatory clause which was relied upon by the court below to immunize the lessor from liability did not represent the meeting of the minds but rather constituted a contract of adhesion violative of public policy and which should not be given legal effect. Two judges dissented.

Six months later in 1966 the Supreme Court of Pennsylvania in *Employers Liability Assurance Corp. v. Greenville Business Men's Association*,<sup>96</sup> considered a case in which the lessor of a building for various business uses relied upon an exculpatory clause in a lease when the lessor was sued by various tenants for damages caused by the building's water sprinkling system which became activated and caused flooding and damage to the lessee's premises prior to the execution of the lease. It was contended in the case that the exculpatory clause relieving the lessor from liability was inapplicable because the lessor's failure to keep the water

<sup>95</sup> *Id.* at 304-05, 219 A.2d at 465.

<sup>96</sup> 423 Pa. 288, 224 A.2d 620 (1966).

pipes at the proper level or to keep the building heated so that the water in the low places in the pipes would not freeze, occurred prior to the execution of the lease. The court noted that despite the general validity of exculpatory provisions certain interpretive standards have been established before an exculpatory provision will be construed to relieve a person of liability for his own or his servant's acts of negligence. The court summarized the standards:

- (1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law . . . ; (2) such contracts 'must spell out the intention of the parties with the greatest of particularity' . . . ; (3) such contracts must be construed with every intentment against the party who seeks the immunity from liability . . . ; (4) the burden to establish immunity from liability is upon the party who asserts such immunity. . . .<sup>97</sup>

Adhering to these rules of interpretation, the court concluded that the exculpatory clause was not intended to operate prospectively and would not preclude an action against the lessor for damages caused by the water sprinkler system which became activated and caused flooding to lessee's premises prior to the execution of the lease.

In 1969 the Pennsylvania Supreme Court<sup>98</sup> was again faced with the recurring problem as to whether an exculpatory clause was sufficiently clear and exact to exculpate a lessor from liability. In this case commercial tenants as lessees brought an action against the lessor because the lessee's property was damaged when the sprinkler system in the leased building froze and burst, thereby releasing water and damaging property of the tenants. The leases contained various exculpatory clauses which spelled out in great detail that the lessors were relieved from all liability for negligence of themselves or their agents. The court held that the exculpatory clauses did not protect the lessor from liability. The court relied upon the *Employers* case and held that in order for an exculpatory clause in a written lease purporting to extend immunity from liability for negligent conduct to embrace such conduct occurring before as well as after the execution of the lease, the intent of the parties to that effect must be expressed with utmost clarity and without any ambiguity. At one point in the opinion the court said that the instant case and *Employers* are strikingly similar for in both cases the tenants alleged that the condition which resulted in the water flow occurred prior to the lease and tenants had no knowledge or reason to know of the condition. The court then made an interesting comment:

The instant case is, if anything, stronger than *Employers*. There the ex-

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<sup>97</sup> *Id.* at 292, 224 A.2d at 623.

<sup>98</sup> *Korwasinski v. Rasner*, 436 Pa. 32, 258 A.2d 865 (1969).

culpatory clause was typed into a printed lease, not, as here, part of the fine print of the lease where it would least likely be found.<sup>99</sup>

It would seem evident that while the Pennsylvania Supreme Court in these recent cases has stated that generally exculpatory clauses are valid, the court has carefully circumscribed legal enforcement of such clauses with strict rules of interpretation, and that the recent cases in denying the applicability of exculpatory clauses to specific factual situations certainly challenges the ingenuity of contract drafters and makes it manifest that unless such clauses are models of clarity they may well meet with judicial rebuff.

It should also be noted that the *Manius* case, where the Supreme Court of Pennsylvania sustained the validity of an exculpatory clause in a lease between a tenant and a public housing authority, has been rejected by the Supreme Court of Washington in a 1967 decision, *Thomas v. Housing Authority of City of Bremerton*,<sup>100</sup> where an exculpatory clause in tenant's written lease with the public housing authority was held unenforceable as contrary to public policy. The litigation involved an action against the city housing authority for injuries sustained by tenants' child who was scalded by hot water allegedly because of the authority's negligent maintenance of a hot water heater. The court concluded that a decision of the Supreme Court of Alabama,<sup>101</sup> which held invalid an exculpatory clause in the lease of a public housing authority, was more carefully reasoned than the *Manius* case.

#### IV. ABUSE OF BARGAINING POWER—FREEDOM OF CONTRACT NOT AN ILLIMITABLE DOCTRINE

The result reached by the Supreme Court of New Jersey in the 1960 opinion in the *Henningsen* case<sup>102</sup> has a special significance in not only the result but also the rationale used to arrive at the decision. The court forthrightly held that a disclaimer clause in the form contract purchase order for a new automobile which purported to limit liability for breach of warranty to replacement of defective parts was invalid as being inimical to public policy. The factual situation of the case was not complex. In 1955 a new Plymouth sedan was purchased by Mr. & Mrs. Henningsen. About ten days later while the automobile was being driven by Mrs. Henningsen she heard a loud noise from the bottom of the hood, and she testified that the steering wheel spun in her hands and the car crashed into a highway sign and a brick wall causing her substantial personal injury. At the trial, the evidence indicated that the accident was the result of a

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<sup>99</sup> *Id.* at —, 258 A.2d at 869.

<sup>100</sup> 71 Wash. 2d 69, 426 P.2d 836 (1967).

<sup>101</sup> *Housing Authority of Birmingham Dist. v. Morris*, 244 Ala. 557, 14 So. 2d 527 (1943).

<sup>102</sup> 32 N.J. 358, 161 A.2d 69 (1960).

mechanical defect or failure. The purchase order contract form signed by Mr. Henningsen was a typical printed form of one page. In an addition to the usual description of the automobile and accessories to be sold, the form contained two paragraphs on the front indicating that the front and back of the form comprised the entire agreement between the parties. The disclaimer clause was contained on the back of the form in the terms of an express warranty by the manufacturer providing that the manufacturer promised to replace any parts of the auto which were defective because of material or workmanship within ninety days after delivery of the car or before the vehicle was driven four thousand miles, whichever first occurred. This express warranty was followed by the language of the disclaimer that

... [t]his warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its [the manufacturer's] part . . . .<sup>103</sup>

Many of the key passages from the opinion of the court in the *Henningsen* case have already been referred to. Suffice at this point to again note that Justice Francis emphasized the lack of competition among the car makers as to warranty protection and stressed that the car buyer has no place to go to negotiate for better protection. The “. . . gross inequality of bargaining position occupied by the consumer in the automobile industry . . .”<sup>104</sup> is emphasized by the opinion. The court concluded that the disclaimer clause was unenforceable because it was contrary to public policy. With respect to public policy the court stated:

Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another . . . . Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way.<sup>105</sup>

Having noted that the concept “public policy” defies easy definition Justice Francis concluded:

In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.<sup>106</sup>

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<sup>103</sup> *Id.* at 367, 161 A.2d at 74.

<sup>104</sup> *Id.* at 391, 161 A.2d at 87.

<sup>105</sup> *Id.* at 403-04, 161 A.2d at 94-5.

<sup>106</sup> *Id.* at 404, 161 A.2d at 95.



Conjectural analysis of the precise rationale of the *Henningsen* case could be endless. Certainly under the facts of the case the court concluded that the assent of the buyers of the auto to the terms of the contract was only apparent and not genuine and knowledgeable. This decision was rendered without the benefit of an enabling statute such as section 2-302 of the Uniform Commercial Code which grants a court the authority to hold that a contract is unenforceable because it is unconscionable.

The concept of public policy does not admit of exactitude of definition. However, in 1916 a judge with substantial courage attempted the following definition of public policy:

In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.<sup>107</sup>

The omnipresent "public policy" was relied upon in *American States Insurance Co. v. Hannan Construction Co.*<sup>108</sup> to invalidate an exculpatory clause in a commercial lease. In this case the court held that a department store was not constructed in conformity with the Building Code requirements of Ohio and accordingly the court refused to enforce an exculpatory clause in favor of a lessor because to do so would thwart the public policy of Ohio as reflected in its Building Code.<sup>109</sup>

Five years after the *Henningsen* case, the doctrines of unconscionability and disparity of bargaining power were relied upon in another famous common law case, *Williams v. Walker-Thomas Furniture Company*<sup>110</sup> where the court relying upon *Henningsen* and other cases refused to enforce a contract because of its unconscionable qualities. In so doing the court noted that "[I]n other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable."<sup>111</sup> The seller in this case operated a retail furniture store in the District of Columbia and sold various household items on the installment plan. The printed form used by the seller included what is commonly known as an "add-on" provision. The court characterized this add-on provision as follows:

The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased

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<sup>107</sup> *Pittsburgh, C., C. & St. L. Ry. v. Kinney*, 95 Ohio St. 64, 68, 115 N.E. 505, 507 (1916).

<sup>108</sup> 283 F. Supp. 988 (N.D. Ohio 1966), *aff'd*, 392 F.2d 171 (6th Cir. 1968).

<sup>109</sup> *Id.* at 1007.

<sup>110</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>111</sup> *Id.* at 448.

automatically became subject to a security interest arising out of the previous dealings.<sup>112</sup>

The buyer, Mrs. Williams, purchased a stereo set in 1962 at a stated value of \$514.95. She defaulted in her payments and the seller sought to replevy all items she had purchased over a period of years pursuant to the add-on clause. The buyer asserted that the contract was unconscionable. The trial court held for the seller, and the intermediate court affirmed, although such court strongly condemned the seller's conduct and expressed the wish that an appropriate statute were in effect so as to be helpful to the court in granting appropriate relief to the buyer. However, the United States Court of Appeals for the District of Columbia did not feel stultified by the absence of a statute. The court observed initially that ". . . the notion that an unconscionable bargain should not be given full enforcement is by no means novel."<sup>113</sup> The court then set forth the following quotation from *Scott v. United States*:<sup>114</sup>

If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.<sup>115</sup>

In its exploration of the meaning of the term unconscionability, the court relied heavily on the *Henningesen* case. With respect to unconscionability the court stated:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.<sup>116</sup>

The court then gave direct analysis to whether the assent of the buyer was apparent or genuine by stating:

The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of

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<sup>112</sup> *Id.* at 447.

<sup>113</sup> *Id.* at 448.

<sup>114</sup> 79 U.S. 443, (1830).

<sup>115</sup> *Id.* at 445, 350 F.2d at 448.

<sup>116</sup> 350 F.2d at 449.

its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.<sup>117</sup>

Because the trial court and the appellate court in the *Williams* case concluded that enforcement of the contract could not be refused no findings were made on the possible unconscionability of the contract. Hence, the court of appeals remanded the case to the trial court for further proceedings since it was felt that the record was not sufficient for the court to decide the issue as a matter of law.

The Uniform Commercial Code was enacted by Congress for the District of Columbia subsequent to the contracts involved in this case, and hence the court did not base its decision on section 2-302 of the Code which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. However, in referring to section 2-302 of the Code, the court indicated that it felt the pre-Code law on unconscionability was virtually the same as this section.

While the *Henningsen* case has commanded much judicial attention, it has not completely mesmerized all courts. In *Marshall v. Murray Oldsmobile Co., Inc.*,<sup>118</sup> the Supreme Court of Appeals of Virginia, in a factual situation involving the same disclaimer of warranty as was found in the *Henningsen* case, reaffirmed the traditional concept that the court cannot make a new contract for the parties.<sup>119</sup> In this 1967 case, the court considered an action by a buyer of an automobile against the seller. The buyer of the automobile contended that the automobile was inoperable and worthless because of the defective conditions therein. The defendant automobile dealer contended that it had furnished the buyer with a new car warranty in writing and asserted that it had fulfilled its obligations under that warranty. The seller further alleged that the written warranty given the buyer provided that there were no warranties expressed or implied other than the new car warranty and that the written warranty was "... in lieu of all other warranties, expressed or implied and all obligations or liabilities on Dealer's part."<sup>120</sup>

The court held that the provisions of the expressed new car warranty did exclude the existence of an implied warranty of fitness of the automobile sold to the plaintiff-buyer. The court then considered the buyer's contention that the exclusionary provisions of the express warranty should

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<sup>117</sup> *Id.* at 449-50.

<sup>118</sup> 207 Va. 972, 154 S.E.2d 140 (1967).

<sup>119</sup> *Id.* at 976, 154 S.E.2d at 144.

<sup>120</sup> *Id.* at 973, 154 S.E.2d at 143.

be held invalid for "'... overriding reasons of public policy.'" <sup>121</sup> In making this argument the buyer relied clearly on the *Henningsen* case wherein the Supreme Court of New Jersey held similar exclusionary language to be invalid as inimical to the public good. With reference to the *Henningsen* case, the Supreme Court of Appeals of Virginia stated: Though the reason therefore is somewhat obscure, the court apparently felt that the disclaimer clause was 'inimical to the public good'. . . . <sup>122</sup> The Virginia Court then referred to that part of the *Henningsen* case wherein the Supreme Court of New Jersey stated that the gross inequality of bargaining position occupied by the consumer in the automobile industry is apparent. In commenting further on *Henningsen*, the Virginia court concluded:

A reading of the *Henningsen* case and a tracing of its questionable acceptance in other jurisdictions since it was decided in 1960 fail to convince us of the efficacy of following the action of the New Jersey court. We are loathe to make such abrupt changes in settled law and reluctant to declare invalid the formal undertakings of parties for such vague reasons of public policy. <sup>123</sup>

The Virginia court refused to hold invalid the exclusionary language of the express warranty offering two reasons: 1) previous decisions of the court had given approval to mutual agreement by parties to determine and fix the only warranty by which they are to be bound in the sale of automobiles, 2) the court further concluded that if there exists the "overriding reasons of public policy" as claimed by the buyer and as relied upon by the New Jersey court in *Henningsen*, such reasons would surely have been apparent to the Virginia legislature when in 1964 it adopted the Uniform Commercial Code effective January 1, 1966. In this respect, the court noted that the Virginia legislature while providing in the Code that there should be an implied warranty of fitness attached to the sale of goods, the legislature specifically provided in another section how such an implied warranty may be excluded. <sup>124</sup>

The instant case arose before the effective date of the Code in Virginia, and hence the court was concerned with only common law doctrines. But the court emphasized that it was persuaded to reject the argument of unconscionability by the buyer because the legislature in adopting the Uniform Commercial Code in 1964 did not recognize the existence of public policy reasons sufficient to require it to say that there shall be no exclusion of implied warranties of fitness in the sale of personal property.

In concluding that the exclusionary provision of the express warranty by the seller was valid, the court emphasized that no fraud, mistake or

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<sup>121</sup> *Id.* at 975, 154 S.E.2d at 143.

<sup>122</sup> *Id.* at 977, 154 S.E.2d at 144.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 978, 154 S.E.2d at 145-46; see UNIFORM COMMERCIAL CODE §§ 2-315, 2-316.

disability was alleged by the buyer. The rationale of this conclusion of the court was set forth in the opinion as follows:

So too, here, the defendant's express warranty, in language which admits of no uncertainty or ambiguity, excluded the existence of any implied warranty of fitness. No greater inconsistency could be conceived than to imply a warranty of fitness where the clear language of an express warranty says that none shall exist. To ignore that inconsistency and imply a warranty of fitness would be to make a new contract for the parties. That the court can not and will not do.<sup>125</sup>

The courts have not often attempted to define with specificity the term "unconscionability" or "unconscionable contract." In an early English case it was held that an unconscionable bargain is one

Such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.<sup>126</sup>

This definition was adopted by the United States Supreme Court in an early case.<sup>127</sup> This same definition of unconscionability was relied upon in a 1931 Indiana lower court decision<sup>128</sup> where the court refused to enforce the action of a bank president to recover on a contract whereby a merchant, ostensibly for the president's services in procuring a loan from the bank, promised to pay the president \$100 monthly. The court concluded that the contract was unconscionable and would not be judicially enforced.

In the leading cases, however, where the courts have refused to enforce a contract because of its unconscionability, they have deemed it imprudent or unnecessary to define the term. An earlier but somewhat classic case illustrating that equity will not enforce an unconscionable bargain was *Campbell Soup Company v. Wentz*<sup>129</sup> where the court denied the plaintiff's soup company specific performance of a contract for the sale to it of all of a particular type of carrot grown on the defendant's farm during the 1947 season. The court initially concluded relative to the adequacy of the legal remedy that in this factual situation the case was a proper one for equitable relief. However, the court refused to grant specific performance.

We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience. For each individual grower the agreement is made by filling in names and quantity and price on a printed form furnished by the buyer. This form has quite obviously been drawn by skillful draftsman with the buyer's interests in mind.<sup>130</sup>

<sup>125</sup> 207 Va. at 976, 154 S.E.2d at 144.

<sup>126</sup> *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750). A similar definition was given in *Martin v. Approved Bancredit Corp.*, 224 Ga. 550, 163 S.E.2d 885 (1968).

<sup>127</sup> *Hume v. United States*, 132 U.S. 406 (1889).

<sup>128</sup> *Stiefler v. McCullough*, 97 Ind. App. 123, 174 N.E. 823 (1931).

<sup>129</sup> 172 F.2d 80 (3rd Cir. 1948).

<sup>130</sup> *Id.* at 83.

The court then referred to provisions of the contract which it deemed harsh. One paragraph provided that the carrots were to have their stalks cut off and be in clean sanitary bags or other containers approved by Campbell. The paragraph concluded with the statement that Campbell's determination of conformance with such specifications shall be conclusive. The provision of the contract however, upon which the court focused its attention, and which led the court to conclude that the contract was unconscionable, was a provision that excused Campbell from accepting carrots which it could not use because of certain circumstances such as labor disturbances, work stoppage or strikes involving Campbell's employees. But even under such circumstances, the grower, while he could not hold Campbell liable for failure to take the carrots, was not permitted to sell them elsewhere unless Campbell agreed. In refusing to authorize specific performance of the contract, the court concluded:

As already said, we do not suggest that this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist.<sup>131</sup>

The essence of the court's rationale was that the agreement was too one-sided and was lacking in contractual reciprocity. In short, Campbell had driven too hard a bargain.

Just three years later, a Campbell contract was again before a court<sup>132</sup> and again farmer-defendants contended that the contract was unfair and therefor unenforceable in equity relying on the previous *Campbell* case. The federal district court noted that in the previous *Campbell* case, the contract provision considered the most harsh was that one which excused Campbell from accepting carrots under specified circumstances but which prohibited the farmers even under such circumstances from selling the carrots elsewhere unless Campbell consented thereto. The court noted that the objectionable provision in the Campbell contract in the first case had been eliminated and that Campbell had revised the grower's contract and balanced its terms. In this later case specific performance was granted with the observation that

All of the provisions of the contracts herein are mutual and benefit the farmers and the Company equally. For example, the provision relating to contingencies exonerates both the growers and Campbell of default or delay in certain circumstances.<sup>133</sup>

The first *Campbell* case referred to is of special significance since the comments to the unconscionability clause of section 2-302 of the Uniform Commercial Code state that the principle involved in that statute is

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<sup>131</sup> *Id.* at 84.

<sup>132</sup> *Campbell Soup Co. v. Diehm*, 111 F. Supp. 211 (E.D. Pa. 1952).

<sup>133</sup> *Id.* at 215.

. . . one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. . . .<sup>134</sup>

There is of course no dearth of authority in which specific performance of a contract has been denied because the contract terms were deemed to be unconscionable, oppressive or unfair. The *Campbell* case is often cited as the classic illustration of this principle. As only another example of the doctrine, reference is made to a 1955 decision<sup>135</sup> by the Supreme Court of Missouri where in specific performance of a contract for sale of a house worth \$11,000 to \$12,000 for \$2,400 was deemed so inadequate by the court as to make the contract and its enforcement oppressive and unfair, and hence specific performance was denied to the buyer.

The United States Supreme Court, in *Bisso v. Inland Waterways Corporation*,<sup>136</sup> took judicial cognizance of the disparity of bargaining power in holding that a towboat owner could not validly contract against all liability for his own negligent towage. This conclusion which the Court based on public policy was also needed ". . . to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."<sup>137</sup>

#### V. LACK OF MEANINGFUL ASSENT CASES

Reference will now be made to some selected cases wherein the courts have focused attention on the circumstances under which a contract was entered into in concluding that a contract or a portion thereof should not be enforced because one party to the contract did not meaningfully assent thereto.

A series of decisions by the Pennsylvania Supreme Court have indicated that the physical placement of a contract provision is of legal significance to courts. In a 1953 decision, *Cutler Corp. v. Latshaw*,<sup>138</sup> a homeowner signed a builder's contract form calling for extensive work and repair to be done on the homeowner's premises. The homeowner became dissatisfied with the repair work and ordered the plaintiff's (contractor's) employees off the job. The plaintiff-contractor confessed judgment against the homeowner pursuant to an alleged warrant of attorney clause contained in the printed form contracts signed by the defendant-homeowner. The contract consisted of five form sheets carrying certain printed matter, such as specifications of work to be done and materials to be supplied. The

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<sup>134</sup> UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

<sup>135</sup> *Miller v. Coffeen*, 365 Mo. 204, 280 S.W.2d 100 (1955).

<sup>136</sup> 349 U.S. 85 (1955).

<sup>137</sup> *Id.* at 91. See also *Weaevr v. American Oil Company*, 261 N.E.2d 99 (Ind. App. 1970).

<sup>138</sup> 374 Pa. 1, 97 A.2d 234 (1953).

face side of the contract referred to "conditions" on the reverse side among which was buried the supposed authority for a warrant of attorney. In this situation the court refused to enforce the alleged warrant of attorney and confession of judgment clause, saying that under this factual pattern it

. . . can hardly be accepted in a court of law as an acknowledgement of a confession of judgement. While the word 'condition' may conceivably embrace almost any circumstance, upon which, or, because of which, a right is created or a liability attaches, it cannot be used to mean surrender of fundamental personal and property absolutes unless the word appears within a setting which warns of the potency of the capitulation being made.<sup>139</sup>

The opinion of the court emphasizes that a person in the position of the plaintiff-homeowner would not have expected to find the confession of judgment clause in the document which he signed. Contrary to the traditional rule that one is bound by what one signs, the court concluded that the confession of judgment clause was here inapplicable and unenforceable and stated:

. . . [W]hen a party to a contract seeks to bind the other party with the unyielding thongs of a warranty of attorney-confession of judgement, a device not ordinarily expected by a homeowner in a simple agreement for alterations and repairs, the inclusion of such a self-abnegating provision *must appear in the body of the contract and cannot be incorporated by a casual reference with a designation not of its own*.<sup>140</sup> (Emphasis supplied)

In a 1956 decision<sup>141</sup> the Pennsylvania Supreme Court affirmed and further explained the position taken with reference to the confession of judgment clause in *Cutler Corp. v. Latschaw*.<sup>142</sup> In the 1956 decision there was involved an equipment rental agreement which contained on its face side the provision that "this Contract and all Terms and Conditions, rights and remedies herein contained and set forth on the reverse side hereof shall bind the parties hereto. . . ." <sup>143</sup> The reverse side of the agreement contained twenty-one paragraphs of fine print, one of which contained the warrant to confess judgment. The court held the confession of judgment clause inapplicable and unenforceable. The rationale of the court's decision was set forth as follows:

A general reference in the body of an executed lease to terms and conditions to be found outside the agreement is insufficient to bind the lessee to a warrant of attorney not contained in the body of the lease unless the lessee signs the warrant where it does appear. In short, a warrant of at-

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<sup>139</sup> *Id.* at 4, 97 A.2d at 236.

<sup>140</sup> *Id.* at 8, 97 A.2d at 238.

<sup>141</sup> *Franz Tractor Co., Inc. v. Wyoming Valley Nursery*, 384 Pa. 213, 120 A.2d 303 (1956).

<sup>142</sup> 374 Pa. 1, 97 A.2d 234 (1953).

<sup>143</sup> 384 Pa. 213, 214, 120 A.2d 303, 304.



torney to confess judgment is not to be foisted upon anyone by implication or by general and nonspecific reference.<sup>144</sup>

In the 1962 decision of *L. B. Foster Co. v. Tri-W Construction Co., Inc.*,<sup>145</sup> the court sought to further clarify its position on the confession of judgment clauses. In this case rental agreements contained confession of judgment provisions set out on the reverse sides of such agreements. The face sides of the agreements did not indicate inclusion of any warrants and the signatures of the parties appeared only on the face sides. The face sides of the contract did, however, contain references to "terms and conditions" which included the confession of judgment clauses on the reverse side of the agreements. The court held that judgments based upon the confessions or warrants of attorney provisions on the reverse side of the agreements to be invalid. The case clearly seems to hold that the confession of judgment clauses are invalid and unenforceable unless they appear on the same side of the document as do the signature of the person to be bound by such confession of judgment provisions.

#### VI. TICKET CASES

In an infinite variety of cases the courts have held that the various types of alleged contracts such as baggage checks, checks issued at parking lots and amusement device tickets did not purport to be contracts and that accordingly some provision of limitation therein is not operative unless such clause is specifically brought to the attention of the recipient. In the well-known case of *Klar v. H. & M. Parcel Room, Inc.*,<sup>146</sup> the plaintiff checked a parcel consisting of valuable fur skins with the defendant-bailee who operated a parcel room at a railroad station. When the plaintiff presented the parcel check and demanded the package, he was informed by the defendant that by mistake the parcel had been delivered to another person who had presented a receipt bearing another number. The parcel check accepted by the plaintiff was made of cardboard three inches in length and two and one half inches in width. There appeared on the check in red letters one quarter inch high the word contract and the following language:

This CONTRACT is made on the following conditions and in consideration of the low rate at which the service is performed, and its acceptance by the depositor, expressly binds both parties to the CONTRACT.

Charge—10 cents for every 24 hours or fraction thereof, for each piece covered by this contract.

Loss or damage—no claim shall be made in excess of \$25 for loss or damage to any piece.<sup>147</sup>

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<sup>144</sup> *Id.* at 216, 120 A.2d at 305.

<sup>145</sup> 409 Pa. 318, 186 A.2d 18.

<sup>146</sup> 270 App. Div. 538, 61 N.Y.S.2d 285, *aff'd* 296 N.Y. 1044, 73 N.E.2d 912 (1947).

<sup>147</sup> 270 App. Div. at 540, 61 N.Y.S.2d at 287.

It was held that the plaintiff was not limited in his recovery to the \$25 limitation specified on the claim check. The gist of the court's decision is reflected in the following statement:

The law in this State is well grounded that to bind the bailor to a contract limiting the bailee's liability, it must be established that there is a special contract to that effect; that the bailor has had reasonable notice of the terms and that he has assented to them.<sup>148</sup>

The court's reasoning was that a reasonable man in the position of the plaintiff-bailor would not usually notice the fine print on a parcel check but would rather consider the check not as a contract but as a means of identification only. At another point in the opinion the court said:

There is no proof in this record that there were conspicuous signs or large placards about the parcel room calling attention to the limitation of liability, nor is there evidence that plaintiffs had any other form of notice which embraced the terms of a special contract or that there was any opportunity afforded to plaintiffs to assent to or dissent from the alleged contract. In the absence of any of these items of proof, it cannot be said that a mere acceptance of the parcel check by the bailor with the printed matter thereon, as a matter of law, sufficiently brought to plaintiff's attention the limitation of liability.<sup>149</sup>

The Supreme Judicial Court of Massachusetts in a 1956 decision, *Polonsky v. Union Federal Savings and Loan Association*,<sup>150</sup> emphasized that differing rules are applied by the courts to a document that purports or appears on its face to be a contract as contrasted with documents not purporting to be contracts such as the claim check in the *Klar* case. In the *Polonsky* case the court held that a husband and wife who were depositors in a savings and loan association could not recover from money which had been withdrawn from their account by an imposter on the basis of forged withdrawal slips. The defendant-association successfully urged as a defense the following provision which was printed on the inside of the bank book: "This association shall not be held responsible for money paid out to any person unlawfully presenting this book."<sup>151</sup> The court noted that there was no evidence that any of the printed matter contained in the bank book ever came to the attention or was brought to the attention of the depositors. It held that the depositors could not recover because the passbook on its face purported to set forth terms of a contract and that the depositors had assented to the terms thereof by accepting it, and they were bound thereby whether they had or had not read its contents. Thus, the court announced the traditional rule that a party to a contract is bound by what he signs or assents to, in the absence of

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<sup>148</sup> *Id.* at 541, 61 N.Y.S.2d at 288.

<sup>149</sup> *Id.* at 542, 61 N.Y.S.2d at 289.

<sup>150</sup> 334 Mass. 697, 138 N.E.2d 115 (1956).

<sup>151</sup> *Id.* at 698, 138 N.E.2d at 116.

fraud. However, in the course of its opinion the court made the following observation applicable to the claim check cases when it stated:

Where what is given to a person purports on its face to set forth the terms of a contract, the person, whether he reads it or not, by accepting it assents to its terms, and is bound by any limitation of liability therein contained, in the absence of fraud. . . . On the other hand, where what is received does not purport to be a contract, such as, for example, a baggage check, a check issued at a parking lot, or a ticket to an amusement device, it has been held that the person receiving it is not bound by a limitation of liability unless it is actually known to the recipient.<sup>152</sup>

The doctrine of the *Klar* case is also exemplified in various cases when the owner of an automobile has left such auto at a parking lot for parking and safe keeping, has paid a fee and has been issued a claim check by the bailor-operator of the lot. In the 1950 case of *McAshan v. Cavitt*,<sup>153</sup> the Supreme Court of Texas ruled, in an action by a car owner to recover damages for the loss of an automobile stolen from the defendant's parking lot, that since the owner did not know of the limitations expressed on a parking lot sign and claim check and was not informed that the lot would close at a certain time, the contract of limitation did not include those limitations. The court emphasized that the sign indicating that the lot would close at 6:00 p.m. would be strictly construed against the user thereof and furthermore that the sign had not been seen by the plaintiff and was not called to her attention. The plaintiff did not read the limitations printed thereon and her attention was not directed to the limitations printed thereon. The Ohio Supreme Court has similarly held<sup>154</sup> that printed conditions on a receipt issued by the operator of a parking lot were not part of the contract of bailment in the absence of anything to indicate that the bailor-car owner either expressly or impliedly assented to such printed conditions prior to or contemporaneously with delivery of the property to the bailee.

The doctrine of the baggage check claims illustrated by the famous *Klar* case and others referred to were commented upon at length in the *Henningsen* case. In its summary the court in the *Henningsen* case categorized a number of cited court decisions as follows: (1) Clauses on baggage checks restricting the liability of common carriers for loss or damage are not enforceable unless the limitation is fairly and honestly negotiated and understandingly entered into. (2) The same doctrine applies to limitations on parcel check room tickets citing the *Klar* case and many others. (3) The same doctrine is applicable to automobile parking lot,

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<sup>152</sup> *Id.* at 701, 138 N.E.2d at 117.

<sup>153</sup> 149 Tex. 147, 229 S.W.2d 1016 (1950).

<sup>154</sup> *Agricultural Insurance Co. v. Constantine*, 144 Ohio St. 275, 58 N.E.2d 658 (1944).

garage tickets or claim checks, citing various cases including the previously referred to *Constantine* case decided by the Ohio Supreme Court.<sup>155</sup>

That the manner and circumstance in which a contract is consummated affects judicial enforcement of such contracts is evidenced by two decisions in which beneficiaries were permitted to recover for airline trip insurance policies which policies purported to limit coverage to scheduled airlines.<sup>156</sup> In both of these decisions the airline trip insurance was purchased by the deceased from an automatic vending machine at the airport. In both cases the insurance company claimed as a defense that the death of the insured resulted while he was a passenger on a non-regularly scheduled airline. However the Court of Appeals of New York and the Supreme Court of California permitted the beneficiary of the insurance contract to recover. In concluding that the beneficiary of the airline insurance policy could recover, the New York Court of Appeals noted that signs and placards at the airport indicated that the policy covered flights on "scheduled" airlines. However, the court held that the limitation in the policy relative to application only to "scheduled" airlines was inapplicable and inoperative. The court in its opinion stated:

We all know that a contract of insurance, drawn by the insurer, must be read through the eyes of the average man on the street or the average housewife who purchases it. Neither of them is expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a plane.<sup>157</sup>

With reference to the sale of the insurance policy by vending machines as bearing on the lack of meaningful mutual assent the court stated:

It may save money to have a number of machines instead of a salesman. It may be wise because people hurrying to planes will not wait on a line to buy insurance. However, there must be a meeting of minds achieved between the applicant and the company through an application and signs and lettering, for while the applicant has a mind the machine has none and can not answer questions. If the defendant had paid for a living salesman, the decedent would not have purchased the insurance if it did not cover her trip or she might have purchased it and changed her plane.<sup>158</sup>

In the 1963 decision of the California Supreme Court, the court permitted recovery by the beneficiary of the airline insurance policy where the insured was killed while a passenger on a non-scheduled airline despite the specific provision in the policy which provided that the policy did not cover other than scheduled air carriers. The court emphasized the special

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<sup>155</sup> 32 N.J. at 396-97, 161 A.2d at 90-91.

<sup>156</sup> *Lachs v. Fidelity & Casualty Co. of New York*, 306 N.Y. 357, 118 N.E.2d 555 (1954); *Steven v. Fidelity and Casualty Co. of New York*, 27 Cal. Rptr. 172, 377 P.2d 284 (1962).

<sup>157</sup> 306 N.Y. at 364, 118 N.E.2d at 558.

<sup>158</sup> *Id.* at 366, 118 N.E.2d at 559.

circumstances of the case in that the insurance policy was purchased from a vending machine amidst the hurry-scurry of an airline terminal and concluded that coverage limitations of the policy should be plainly and clearly brought to the attention of insurance purchasers.

In its opinion the California Supreme Court referred to the famous *Henningsen* decision of the New Jersey Supreme Court.

The instant contract presents an even stronger case than *Henningsen* for the requirement that the exclusionary clause of the contract should not be enforced in the absence of plain and clear notification to the public. The disparity in bargaining power between the insurer and the insured here is so tremendous that the insured had adopted a means of selling policies which makes bargaining totally impossible. The purchaser lacks any opportunity to clarify ambiguous terms or to discover inconspicuous or concealed ones. He must purchase the policy before he even knows its provisions.<sup>159</sup>

In concluding its opinion, the California Supreme Court directed the trial court to enter judgment for the plaintiff who was the beneficiary of the policy and stated:

The exclusionary clause of that contract, upon which the insurance company relies, is an unexpected one. Its application in some circumstances would be *unconscionable*. It is placed in an inconspicuous position of the document.<sup>160</sup> (Emphasis supplied.)

#### VII. THE UNCONSCIONABILITY CLAUSE OF THE UNIFORM COMMERCIAL CODE—IS IT A SOLUTION FOR UNCONSCIONABLE CONTRACTS?

Section 2-302 of the Uniform Commercial Code in specific and direct language grants authority to a court to refuse enforcement of a contract upon the court's finding that the contract or any clause thereof was unconscionable at the time such contract was made. In a forthright and singularly unique way the Code grants what appears to be unbridled discretion to a court to refuse to enforce a contract because the court concludes that the contract is unconscionable at the time the same was entered into. Based upon the bare language of the statute, it could be concluded that it is merely a codification or restatement of the common law doctrine of unconscionability as characterized by such candid decisions in the *Henningsen* case and the *Walker* furniture case. In the alternative, the statute might be viewed as a carte blanche authority to the judiciary to emasculate the entire stability of contracts. Based upon the surprisingly few cases that have been decided under this statute, it is the writer's belief that it has received temperate and enlightened use by the courts. Section 2-302 of the Code reads as follows:

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<sup>159</sup> 27 Cal. Rptr. at 185-86, 377 P.2d at 297-98.

<sup>160</sup> *Id.*

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.<sup>161</sup>

From a reading of the statute it is apparent that seemingly unlimited authority is granted to a court to refuse the enforcement of contract under any circumstances the court deems to constitute the requisite unconscionability. The clause has been both praised and criticized.<sup>162</sup> Much of the criticism is directed to the failure of the statute to set standards to guide the court for determining what is or is not unconscionable and for the broad authority given the court to remake a contract. The quoted statute does not define the term "unconscionable" nor are the various factors or criteria of unconscionability enumerated. The problems presented in an application of the unconscionable clause of the Code would seem to place the court in a totally isolated area of discretion which would seem to present more vexatious problems than in those areas where the courts have held exculpatory clauses invalid as being contrary to public policy where the court found the indicated public policy in a statute.<sup>163</sup>

The following comments of the draftsman of section 2-302 indicate its basic purpose:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not

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<sup>161</sup> UNIFORM COMMERCIAL CODE § 2-302.

<sup>162</sup> *Beaver, The Uniform Commercial Code's Solution For Unconscionable Contracts*, 48 OR. L. REV. 209, 210 n.6 (1969).

<sup>163</sup> *Tunkl v. Regents of University of California*, 32 Cal. Rptr. 33, 383 P.2d 441 (1963). The court held invalid a release from liability for future negligence imposed as a condition of admission to a charitable hospital. It was concluded that a California statute invalidated the hospital's attempt to exempt itself from negligence.

of disturbance of allocation of risks because of superior bargaining power.<sup>164</sup>

Before reviewing some of the surprisingly few cases decided under the unconscionable clause, it seems appropriate to explore whether the courts will confine the application of section 2-302 to sales contracts falling under article 2 of the Uniform Commercial Code. In 1968 the Supreme Court of New Mexico<sup>165</sup> held that section 2-302 of the Code is limited in its application to sales and does not apply to security transactions. However, in *Unico*<sup>166</sup> the New Jersey Supreme Court relied upon section 2-302 in refusing to enforce a "waiver of defenses" clause in an action by the buyer of a note against the maker thereof which litigation involved non-sales areas of the Code such as article 3 and section 9-206. In *State Bank of Albany v. Hickey*<sup>167</sup> a lower court in New York considered but refused to apply section 2-302 to the financing arrangements that governed the discounting of chattel paper between an automobile dealer and his bank.

It would seem inadvisable on the basis of the few decided cases to conclude that section 2-302 will be judicially confined to sales of goods<sup>168</sup> under article 2 of the Code.

A 1968 decision of a New Jersey lower court, *Zabriskie Chevrolet, Inc. v. Smith*,<sup>169</sup> indicates that the unconscionability provision of section 2-302 may be applied alternatively by the court even though the court also concluded that a specific contract clause involving a disclaimer of warranties did not conform to the specific requirement of section 2-316(2) of the Code that language for the exclusion or modification of implied warranties of merchantability or fitness must be conspicuous. In the court action, whereby an automobile dealer sued the buyer of a new automobile for the balance of the purchase price and incidental charges, the court held that the paragraph in fine print on the back of the automobile sales contract to the effect that there were no warranties on the motor vehicle sold by the dealer except new vehicle warranty was not "conspicuous"

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<sup>164</sup> UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

<sup>165</sup> *Hernandez v. S.I.C. Finance Co.*, 79 N.M. 673, 448 P.2d 474 (1968).

A United States District Court in 1967 also ruled that security transactions are beyond the scope of section 2-302 which permits a court to refuse to enforce an unconscionable contract. The court held valid a secured creditor's claim against a bankrupt based on a transaction whereby bankrupt had obligated itself to repay \$26,000 over a three year period, with six percent interest, for net loan of \$19,267. In re *Advance Printing and Litho Co.*, 277 F. Supp. 101 (E.D. Pa.), *aff'd*, 387 F.2d 952 (3d Cir. 1967).

<sup>166</sup> 50 N.J. 101, 232 A.2d 405 (1967).

<sup>167</sup> 29 App. Div. 2d 993, 288 N.Y.S.2d 980 (Sup. Ct. App. Div. 1968). In *Robinson v. Jefferson Credit Corp.*, 4 UCC Rep. Service 15 (N.Y. Sup. Ct. 1967), the court applied section 2-302 in a situation involving the repossession of an auto even though there is no unconscionability clause in article 9 of the Uniform Commercial Code.

<sup>168</sup> UNIFORM COMMERCIAL CODE § 2-105.

<sup>169</sup> 99 N.J. Super. 441, 240 A.2d 195 (1968).

within the meaning of section 2-316, Uniform Commercial Code and therefore did not exclude implied warranties of merchantability of fitness. Interestingly, however, the court saw fit to extend its opinion by pointing out that attempts at limitation and disclaimer of the type herein involved were severely criticized in the *Henningsen* case. The court concluded that the "public policy" concept of *Henningsen* finds statutory support in sections 2-316 and 2-302 of the Code.<sup>170</sup>

The same New Jersey court in another 1968 opinion<sup>171</sup> held that a contract for the sale of the freezer was unenforceable because it was procured by a fraud and because the price was "unconscionable" under section 2-302 of the Code. The court interpreted the evidence as indicating fraudulent misrepresentation by the seller. However, the court also specifically found that the contract was unconscionable and therefore unenforceable under section 2-302. With respect to this aspect of its decision, the court concluded:

The conscience of this court is shocked by the price imposed upon these defendants for the freezer. The testimony in court valued the freezer at no more than \$300.00. The price charged was in excess of  $2\frac{1}{2}$  times the maximum value. The time-price differential alone almost equalled the value of the freezer. In light of these facts, this court is constrained to hold the price in this contract unconscionable.

It is therefore the opinion of this court that the contract is unenforceable because it was procured by fraud and is unconscionable.<sup>172</sup>

One of the difficulties presented by the relatively few cases decided to date under the unconscionability clause is that the courts have raised unconscionability only as an alternative ground of decision, and therefore, the courts have not given extended analysis to what constitutes the unconscionable requisite of the Code. The New Hampshire Supreme Court<sup>173</sup> in 1964, as an alternative basis for its decision, found a contract to be unconscionable under section 2-302. However, the court's first predicate of decision was that the contract was voided because of a failure to comply with an interest disclosure statute and hence the court did not give a detailed analytical disclosure of its rationale of unconscionability. The contract involved repair work on the defendant's property. The cost was to be \$1,759.00, but the defendants in applying for financing signed an application containing a blank note and a blank power of attorney. While the application stated the total amount due, the number of monthly payments and the amount of each monthly payment, it did not state the rate of interest as required by the state's disclosure statute. The defendants were notified a few days later of the approval of their application for

<sup>170</sup> *Id.* at 448, 240 A.2d at 199.

<sup>171</sup> *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (1968).

<sup>172</sup> *Id.* at 504, 247 A.2d at 703.

<sup>173</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).



financing which stated that the application for credit in the net amount of \$1,759.00 had been approved and that the monthly payments would be \$42.81 for sixty months "including principal, interest and life and disability insurance."<sup>174</sup> The defendant then notified the plaintiff to cease work on the premises, and the plaintiff brought an action for damages. In addition to holding the contract void for failure to comply with the state's disclosure statute, the court held that recovery could not be had by the plaintiff because the contract was unconscionable under section 2-302. In this regard the court stated:

Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction. . . . (citation omitted) 'It has long been the law in this state that contracts may be declared void because unconscionable and oppressive . . . .'<sup>175</sup>

It was the court's conclusion that there was a gross disparity in the relative values exchanged by the parties to the contract.

In purporting to follow the unconscionability holding of the above case, several lower courts in their decisions have made the finding of unconscionability primarily dependent upon price disparity. Thus, in a New York case it was held that a retail installment contract wherein prices charged varied from two to six times the cost per unit to sellers were unconscionable and hence unenforceable under section 2-302 of the Code.<sup>176</sup> In other recent lower court decisions in New York price disparity has been equated to unconscionability under the Code. In *Jones v. Star Credit Corp.*,<sup>177</sup> an action was brought by the buyers who were welfare recipients to reform a sales contract which they contended was unconscionable. The court held that selling for \$900.00 (\$1,439.69 including credit charges and \$18.00 sales tax) a freezer unit having an actual retail value of \$300.00 was unconscionable as a matter of law under the section 2-302 of the Code. The flavor of the court's opinion is indicated in the following passages from the decision:

On the one hand it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand there is the concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community.<sup>178</sup>

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<sup>174</sup> *Id.* at 436, 201 A.2d at 887.

<sup>175</sup> *Id.* at 439, 201 A.2d at 889.

<sup>176</sup> *State ex rel Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

<sup>177</sup> 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

<sup>178</sup> *Id.* at 190, 298 N.Y.S.2d at 265.

It is interesting to note that in reaching its conclusion that the contract was unconscionable the court refers not only to *American Home Improvement, Inc. v. MacIver*,<sup>179</sup> which was decided under the unconscionable provision of section 2-302 of the Code but also cites *Williams v. Walker-Thomas Furniture Company*.<sup>180</sup> In referring to this latter case the court said: ". . . the meaningfulness of choice essential to the making of a contract, can be negated by a gross inequality of bargaining power."<sup>181</sup>

In a 1967 lower court decision in the State of New York,<sup>182</sup> it was held that excessively high prices may constitute an unconscionable contract under section 2-302 of the Code. The court then held that the defendants, buyers of an automobile, were entitled to reasonable opportunity to present evidence as to the commercial setting of a contract of sale to aid the court in determining whether the contract was unconscionable as a matter of law. Accordingly, it was further held that the assignee of the contract was not entitled to have granted its motion for summary judgment in an action on the contract.

Another case which supports the judicial view that excessive price alone may constitute sufficient basis to find that a contract is unconscionable is *Frostifresh Corp. v. Reynoso*.<sup>183</sup> The sale involved a refrigerator-freezer which would have sold for a cash price of \$900 but added carrying charges of \$246 made the total purchase price \$1145.00. The seller admitted that the appliance had cost him only \$348.00. When the buyer defaulted but maintained possession of the appliance, the seller sought damages for breach of the contract. The trial court held the contract was unconscionable under section 2-302 and limited the seller's recovery to his wholesale price. The decision was reversed as to the remedy, but the appellate court concluded that the evidence supported the finding that the contract was unconscionable. However, the seller was permitted to recover its net cost, plus a reasonable profit in addition to trucking and service charges and reasonable finance charges. In addition to the excessive price, the evidence showed that the buyers were Spanish-speaking persons who could not understand English. Since the sales contract was written in English, the buyers had no ready way of reading or understanding the contract.

It would seem apparent that the relatively few decisions to date under section 2-302 are in accord with the stated intention of the draftsman of the Code and with common law application of the concept of unconscionability.

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<sup>179</sup> 105 N.H. 435, 201 A.2d 886 (1964).

<sup>180</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>181</sup> 59 Misc. 2d at 192, 298 N.Y.S.2d at 267.

<sup>182</sup> Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. 1967).

<sup>183</sup> 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd* as to remedy 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

The discussion of section 2-302 will be ended with a reference to two decisions in which the court did not find the contract unconscionable. In *Sinkoff Beverage Co., Inc. v. Jos. Schlitz Brewing Co.*,<sup>184</sup> a contract between a brewer and a local distributor authorized the parties to terminate the contract upon ten days notice. The agreement which was signed in 1960 provided that the contract could be terminated by either party without cause or notice. In June 1966 the brewery served a ten day notice of termination of the distributorship agreement. The local distributor contended that the ten day notice of termination was unconscionable under section 2-302 of the Code. This argument was rejected by the court because it was concluded that the contract was fair at the time it was made which is when the unconscionability must exist under section 2-302.

In 1969 the United States Court of Appeals for the Seventh Circuit,<sup>185</sup> was faced with the contention that a contract provision was unconscionable and hence unenforceable under section 2-302 as embodied in the statutes of the State of Illinois. The litigation involved the action against an airplane producer and its distributor for damage allegedly resulting from the non-delivery of an airplane to the plaintiff on the date specified in a contract with the distributor. The court held that where the airplane producer was constructing a new type of airplane and it was common to the industry to not promise delivery date and to obtain release from liability in the event of failure to deliver, a provision in producer's purchase order in effect limiting producer's liability for non-delivery to refund of deposit was not unconscionable. The court further held that when production engines proved hazardous so that producer was unable to deliver, the producer was not liable. With reference to the unconscionable clause, section 2-302, the court concluded that such statute ". . . makes clear that the unconscionability of a clause is to be judged not in the abstract, but rather in its commercial setting."<sup>186</sup> Here the producer-defendant was constructing what was at least for itself a new type of airplane construction. The plane was to be turbine powered rather than piston powered. The buyer-plaintiff was aware of this. The producer began by making a prototype. This was successful but later effort with production engines proved hazardous. The evidence showed that when the plaintiff bought another plane from defendant's competitor, the plaintiff accepted the same terms as it claims are unconscionable. Against this background the court held section 2-302 inapplicable.

### VIII. CONCLUSION

Is freedom of contract still relevant? The case law answer is "yes it is relevant and respected but not sacrosanct." It is still a basic tenet

<sup>184</sup> 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

<sup>185</sup> *Dow Corning Corp. v. North American Rockwell Corp.*, 411 F.2d 622 (7th Cir. 1969).

<sup>186</sup> *Id.* at 626.

of contract law that the parties to a contract may, absent statute, control and establish their contractual rights and obligations unless a court refuses to enforce such contract because it is deemed "unconscionable." Various courts in pre-Code decisions have candidly characterized contracts or clauses therein as being "unconscionable" and refused judicial enforcement thereof.

It is submitted that in placing judicial restraint on freedom of contract when the contract is drafted beyond the edge of minimal requisites of fairness, the courts are fostering the preservation and not the emasculation of contract law. It is believed that supine enforcement of all contracts by the rote process of clinging to "freedom of contract" rubric will foster disrespect and cynical suspicion by the populace concerning the judicial process.

In viewing freedom of contract as not an illimitable concept, the courts are getting to the core of contract law and are determining whether there was, in reality, "mutual assent" by the contracting parties. Recurringly, judicial inquiries in contract cases are:

What was the bargain of the parties in fact? Was there a meaningful choice in establishing the contractual terms?

Did gross inequality of bargaining power negate meaningful mutual assent?

In seeking to determine if there was "mutual assent" in fact, the courts have indicated reflective awareness that "freedom of contract" relates to and was judicially developed for negotiated transactions.

A review of the case law indicates no justifiable need for anxiety relative to possible judicial intemperance in qualifying the "freedom of contract" concept when contracts are deemed to be unconscionable. The courts have reflected enlightened concern for the delicate balance between the unquestioned need to preserve integrity of agreements and the desirability to require basic fairness in order that "mutual assent" is equated to meaningful assent.

Legislatures in the enactment of section 2-302 of the Uniform Commercial Code have reposed confidence in the courts to exercise enlightened restraint on freedom of contract by buttressing judicial courage with legislative restatement of the common law concept that a court may refuse to enforce an unconscionable contract.

Section 2-302 also reflects legislative disenchantment with the rigid application of the freedom of contract doctrine in cases where mutual assent in fact seemed to be absent and where the courts appeared more concerned with the formality of the phrase "freedom of contract" than with the realities of the contractual transaction.

There is no definitive indication in the case law that section 2-302 will produce judicial results substantially different than the common law

cases prior to the Code. The Code cases under section 2-302 have relied heavily on the common law cases involving the judicial conclusion that a contract was unconscionable.

That section 2-302 has focused attention upon the concept of unconscionability and provoked some agonizing judicial assessment of the contract as a negotiated transaction reflecting "mutual assent" is clearly reflected in the case law.

The decisions interpreting section 2-302 have given added emphasis to price disparity. There is a discernible judicial trend to conclude that sufficient disparity between value and price may by itself constitute the requisite unconscionability for refusal to enforce a contract.

While there is conflict in the case law as to whether section 2-302 should be limited in scope to article 2 of the Code, it would seem that the attention the statute has riveted on "unconscionability" will in the future result in the expansion of the range of its application beyond sales of goods.

The case law does not reveal that the courts have viewed section 2-302 as a spur to judicial creativity and improvisation in the law of contracts. It is submitted that the relatively small body of case law under the Code "unconscionable" provision has achieved the stated objective in the comments of the Code drafters in that the courts are policing "explicitly against the contracts or clauses which they find to be unconscionable."